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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE Plaintiff and Respondent, v. CHRISTOPHER HUGHES, Defendant and Appellant.	G040721 (Super. Ct. No. 60NF2805) O P I N I O N

Appeal for a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Christopher Hughes guilty of committing a lewd and lascivious act on a child under age 14 (Pen. Code, § 288, subd. (a) [count 1]; all further statutory references are to this code unless specified), three counts of forcible lewd acts on a child under age 14 (§ 288, subd. (b)(1) [counts 4, 6, & 7]), aggravated sexual assault of a child under age 14 (§ 269, subd. (a)(4) [count 5]), and misdemeanor child abuse (§ 273a, subd. (b) [count 8]). He challenges the sufficiency of evidence to support his convictions for forcible lewd acts and aggravated sexual assault. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In early 2005, 11-year-old J.M. and her 13-year-old brother moved into the two-bedroom trailer their mother shared with defendant Christopher Hughes, mother's 25-year-old former boyfriend, and the couple's daughter. Defendant subsequently engaged in various acts of child abuse against J.M. He whipped her with a spiked belt, slapped her face, punched her head and body, duct-taped her to a chair and forced her to eat hot peppers. Once, defendant attached an electric muscle stimulator[1] to various parts of her body and interrogated J.M. When he believed she responded untruthfully defendant would increase the level of pain by elevating the electronic stimulation, causing the child to jump, shake, and undergo spasms. In June 2006, defendant shaved J.M.'s head just before graduation from elementary school, ostensibly because she would not stop pulling out her hair. Although upset and crying, J.M. did not resist or complain, fearing defendant would punish her further.

[1] The device had two patches that were attached to wires. Defendant testified he could not endure intensities beyond level four out of five.

J.M. also testified to several incidents of sexual abuse. Three occurred between March 2005 and July 4, 2006. On each occasion, defendant called her into his room, closed the door, and moved a dresser against the door to block access. He told J.M. to lie down on the bed, directed her to remove her clothes, and proceeded to rub her genitals and breasts. On one occasion he kissed her lips. After defendant was done, he threatened her with a staple gun and stated, "'If you tell anybody, . . . I am going to hurt you.'"[2] She remained silent, fearing he would punish her.

On July 4, 2006, defendant again called her into his room. This time after rubbing her vagina, he inserted his fingers and asked, "'How does that feel?'" The following day, defendant ordered her into his room, placed the dresser against the door and began masturbating himself. J.M. undressed and defendant sat on a chair and made her get on her knees and orally copulate him. He also touched her vagina. He warned her not to tell anyone.

Also in early July 2006, defendant ordered J.M. to raise $100 by collecting and recycling cans and bottles. He demanded $20 per day and pressed a sword against J.M.'s throat, threatening to kill her. On July 12, a woman found J.M. and her brother digging through the dumpsters behind her Anaheim business. J.M. told the woman she had not eaten that morning or the night before. The woman gave the children food and called the police.

After learning social services was investigating, defendant instructed a friend to delete the contents of his computer hard drive. Police later recovered

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[2] A woman who lived with the family and helped care for the children testified that in October 2005, she saw defendant call J.M. into the room and saw defendant leave a few hours later. She saw J.M. still in the room, nude, and putting on her underwear. J.M. looked scared.

pornographic images of children, some of which had been created, accessed and deleted in July 2006.

Defendant testified and admitted using the muscle stimulator, tying J.M. to a chair, force feeding her hot peppers, and requiring her to collect recyclables. He denied sexual abuse, claiming he brought her into his room to spank her bare bottom in privacy to save her the embarrassment of others watching. He also denied any interest in child pornography, claiming files containing child pornography would get mixed in when he downloaded adult pornography and others had access to his computer.

Following a trial in May 2008, a jury convicted defendant of the offenses listed above and found he engaged in substantial sexual conduct. (§ 1203.066, subd. (a)(8) [prohibiting probation, suspension of sentence or relief under section 1385].) The court imposed a 15-years-to-life term for aggravated sexual assault (count 5), and consecutive six-year midterms for two of the forcible lewd act convictions (counts 4 & 7). The court stayed (§ 654) or suspended terms for the other convictions.

II

DISCUSSION

Defendant contends the prosecutor presented insufficient evidence of force, fear, duress or menace to sustain the forcible lewd act (§ 288, subd. (b)(1) [counts 4, 6, & 7]) and aggravated sexual assault (§ 269 [count 5]) convictions.[3] We disagree; even if

[3] Section 288, subdivision (a), provides: "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." Section 288, subdivision (b)(1), provides, "Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

there was insufficient evidence of force, the record contains substantial evidence defendant employed duress, menace, or fear to accomplish his crimes.

We review the record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, defined as evidence that is reasonable, credible, and of solid value. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) We must affirm the judgment below unless "upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmon* (1969) 71 Cal.2d 745, 755.)

"Duress" in the context of the sexual abuse statutes refers to "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 46, 50.) "Fear"

Section 269 provides: "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] . . . [¶] (4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a."

Section 288a provides: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] . . . [¶] (c) (2) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (3) Any person who commits an act of oral copulation where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years."

means a "'feeling of alarm or disquiet caused by the expectation of danger, pain, disaster, or the like; terror; dread; apprehension'. . . ." (*People v. Montero* (1986) 185 Cal.App.3d 415, 425.) Menace "is given the same meaning as set forth in the Civil Code." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 477-478; see *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158.)[4] In determining whether a victim suffered duress, menace or fear, the defendant's position of dominance and authority and his continuous exploitation of the victim are important factors to weigh in the balance. (*Pitmon,* at p. 51.) Of course, the totality of the circumstances must be considered, including the victim's age, her relationship to the defendant, and warnings to the victim that revealing the molestation would result in jeopardizing the family. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 238-239 [sufficient evidence of duress where defendant is a family member, the victim is young, defendant is seen as an authority figure and there is continuous exploitation of the victim].)

Defendant relies on *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*) to support his claim there was insufficient evidence of duress. In *Espinoza,* the victim (L.) testified that the defendant, her father, on five occasions entered her

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[4] Civil Code section 1570 provides: "Menace consists in a threat: [¶] 1. Of such duress as is specified in Subdivisions 1 and 3 of . . . section [1569]; [¶] 2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or, [¶] 3. Of injury to the character of any such person."

Civil Code section 1569 provides: "Duress consists in: [¶] 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; [¶] 2. Unlawful detention of the property of any such person; or, [¶] 3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive." (See also § 261, subd. (c) [menace in rape statute means "any threat, declaration, or act which shows an intention to inflict an injury upon another"].)

bedroom in the early morning to molest her. In four instances, defendant sat on the bed, pulled L.'s pants down and rubbed her breasts and vagina under her clothes with his hands. L. was "'too scared to do anything'" when defendant was molesting her and afraid defendant "'would come and do something'" if she reported the molestations. (*Id.* at p. 1293.) On the fifth occasion, the defendant attempted to have sexual intercourse with his daughter, but she moved to prevent penetration. The defendant then apologized and asked her to forgive him. During one of the molestations, he said, "'Do you still love me'" and then repeatedly said, "'Please love me'" and possibly cried. (*Id.* at p. 1295.)

The court concluded there was insufficient evidence of duress: "Defendant did not grab, restrain or corner L. during the final incident out of which the . . . section 288, subdivision (b) count and the attempted rape count arose. L. did not cry, and she offered no resistance. Instead, defendant simply lewdly touched and attempted intercourse with a victim who made no oral or physical response to his acts." (*Espinoza, supra*, 95 Cal.App.4th at p. 1320.) The court continued, "The only way that we could say that defendant's lewd act on L. and attempt at intercourse with L. were accomplished by duress is if the mere fact that he was L.'s father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress. What is missing here is the '"direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.'" [Citation.] Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat . . . .' [Citation.] No evidence was adduced that defendant's lewd act and attempt at intercourse were

accompanied by any 'direct or implied threat' of any kind. While it was clear that L. was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Id.* at p. 1321; see *People v. Hecker* (1990) 219 Cal.App.3d 1238 [duress based on psychological coercion alone not enough when defendant only warned victim not to reveal the molestation because it would ruin his marriage and military career].)

Espinoza is easily distinguished. Here, after the first act of sexual abuse, which was not charged as forcible under section 288, subdivision (b)(1), defendant threatened J.M. with a staple gun and threatened to hurt her if she told anyone. The jury could reasonably conclude J.M. felt compelled to submit because she feared defendant would inflict more painful punishment on her, hardly an unreasonable response given defendant's prior acts of physical abuse. J.M.'s age, defendant's status as parental figure and purveyor of discipline, his prior acts of extreme physical abuse, and his threats to hurt her if she informed on him, all support the jury's conclusion defendant used fear to commit the charged acts of forcible sexual abuse, i.e., defendant was aware of and sought to take advantage of J.M.'s fear, even if he did not threaten or inflict bodily injury during the sexual acts. The evidence here supports at least an implied threat of force, violence, danger, hardship, or retribution. Unlike *Espinoza*, J.M.'s fear stemmed not merely from the prior molestations, but from a history of physical abuse coupled with threats of harm.

This case is closer to *People v. Senior* (1992) 3 Cal.App.4th 765, cited in *Espinoza*. There, during the initial molestation the defendant threatened to hit his daughter if she resisted. During later molestations, he restrained her. The court found

sufficient evidence of duress in the later molestations based on the prior threat. (*Id.* at pp. 775-776.) Substantial evidence supports the convictions.

III
DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.